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IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

STATE OF IDAHO,

Plaintiff-Appellant,

vs.

DONA NICHOEAL WESTLAKE,

Defendant-Respondent.

No. 42169

Kootenai Co. Case No.
CR-2013-22400

REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF KOOTENAI

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District Judge

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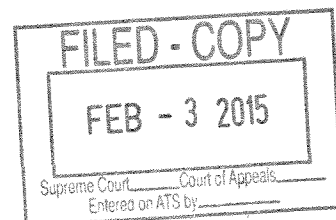


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ARGUMENT IN REPLY

The Police Had Reasonable Suspicion To Believe The Pink Backpack in Gallagher's Motel Room Was Owned, Controlled or Possessed by Gallagher

A. Introduction

The state appeals from the district court's order suppressing evidence found in a pink backpack obtained pursuant to a consent search of a motel room. Katherine Gallagher, who had rented the motel room, gave the detectives consent to search the motel room. (Tr., p. 14, L. 9 – p.15, L. 5, p. 16, Ls. 16-19.) After Gallagher granted consent, Detective Cwik searched a pink backpack he found sitting on the bed in plain view. (Tr., p. 59, L. 15 – p. 60, L. 14.) The pink back contained a pill-type bottle with white crystalline substance and pills. (Tr., p. 15, Ls. 14-24.) Gallagher then denied she owned the pink backpack. (Tr., p. 16, L. 20 – p. 17, L. 1.) Dona Westlake, another person present in the motel room, admitted to owning the pink backpack. (Tr., p. 17, Ls. 2-24.) The state charged Westlake with Possession of a Controlled Substance (Methamphetamine). (R., pp. 38-39.)

The district court suppressed the evidence found in the pink backpack. (Tr., p. 124, Ls. 4-11; R., p. 95.) The district court erred because it did not apply the correct legal standard to determine whether Gallagher had the apparent authority to consent to the search. The correct test is whether, under the totality of the circumstances the officers had a reasonable suspicion that the item was owned, possessed, or controlled by the occupant who consented to the search. State v. Barker, 136 Idaho 728, 731-732, 40 P.3d 86, 89-90 (2002). The district court skipped the "reasonable suspicion test" and instead held the detectives

had a duty of “reasonable inquiry” and that they failed that duty. (Tr., p. 122, L. 21 – p. 124, L. 3.) By not applying the reasonable suspicion test, the district court erred.

B. Standard Of Review

In reviewing an order granting or denying a motion to suppress evidence, the appellate court applies a bifurcated standard of review. State v. Purdum, 147 Idaho 206, 207, 207 P.3d 182, 183 (2009) (citing State v. Watts, 142 Idaho 230, 232, 127 P.3d 133, 135 (2005)). The appellate court defers to the trial court's factual findings unless they are clearly erroneous; however, the appellate court freely reviews the determination as to whether constitutional requirements have been satisfied in light of the facts found. State v. Hansen, 151 Idaho 342, 345, 256 P.3d 750, 753 (2011) (citing State v. Smith, 144 Idaho 482, 485, 163 P.3d 1194, 1197 (2007)).

C. The Officers Had Reasonable Suspicion To Believe That Gallagher Owned, Possessed Or Controlled The Pink Backpack

The district court erred because it did not apply the correct test to determine whether Gallagher had the apparent authority to authorize a search of items found in her motel room, including the pink backpack found on the bed.

If a person consenting to a search does not have actual authority, but government agents reasonably believe that the person has authority, a warrantless search may still be valid. State v. Fancher, 145 Idaho 832, 838-839, 186 P.3d 688, 694-695 (Ct. App. 2008) (citing Illinois v. Rodriguez, 497 U.S. 177, 188-89 (1990); State v. Brauch, 133 Idaho 215, 219, 984 P.2d 703, 707 (1999);

State v. Hawkins, 131 Idaho 396, 400, 958 P.2d 22, 26 (Ct. App. 1998)). The test is whether, under the totality of the circumstances, the officers had a reasonable suspicion that the item was owned, possessed, or controlled by the occupant who consented to the search. Barker, 136 Idaho at 731-732, 40 P.3d at 89-90. The circumstances need not indicate that the item was obviously and undeniably owned possessed or controlled by the person giving consent. Id.

However, the district court did not apply this apparent authority “reasonable suspicion” test. (See Tr., p. 109, L. 2 – p. 125, L. 17.) Instead the district court skipped over the “reasonable suspicion” test and imposed a duty of “reasonable inquiry” that required the officers to ask who owned the pink backpack. (Tr., p. 122, L. 21 – p. 124, L. 3.) The district court relied upon Brauch, which stated, in part:

Police have a duty of reasonable investigation before they may rely upon the authority of a third party to consent to a search:

As with other factual determinations bearing upon search and seizure, determination of consent to enter must be judged against an objective standard: would the facts available to the officer at the moment ... warrant a man of reasonable caution in the belief that the consenting party had authority over the premises? ... *If not, then warrantless entry without further inquiry is unlawful unless authority actually exists.* But if so, the search is valid.

Brauch, 133 Idaho at 221, 984 P.2d at 709 (emphasis added) (quoting Rodriguez, 497 U.S. 177, 188-189 (1990)). However, in Brauch, the police knew they lacked adequate third party consent to search because they were relying on the authority of a landlord to search a tenant's residence. Id. at 217-218, 984 P. 2d at 705-706. As such reasonable investigation was required. Id. at 221, 984 at 709.

Here the officers did not have a duty to investigate further because the apparent authority was established by the known facts. The Idaho Supreme Court has stated that officers are not required “in all circumstances to inquire into the ownership, possession or control of an item” even when “ownership, possession or control is not obviously and undeniably apparent,” and even if they do inquire “they are not necessarily bound by the answer given.” Barker, 136 Idaho at 731-732, 40 P. 3d at 89-90.

The officers had a reasonable suspicion that the pink backpack was owned, possessed or controlled by Gallagher. The backpack was in her motel room. (Tr., p. 41, Ls. 17-21.) It was in the center of the room on the bed. (Tr., p. 15, Ls. 17-24.) Gallagher’s purse was on the bed near the backpack. (Tr., p. 34, Ls. 11-24, p. 70, L. 22 – p. 71, L. 2.) Gallagher did not place any limitations on the scope of the search. (Tr., p. 16, Ls. 16-19.) When Gallagher granted consent to search she did not tell the police that the pink backpack was not hers. (Id.) Detective Cwik believed Gallagher owned the pink backpack. (Tr., p. 78, L. 15 – p. 79, L. 5.) There was nothing in or on the pink backpack that identified it as belonging to someone other than Gallagher. (Tr., p. 30, Ls. 8-13, p. 34, L. 25 – p. 35, L. 3, p. 59, L. 18 – p. 60, L. 14.)

The district court found that Detective Cwik reasonably believed Gallagher had the authority to consent to the search of the items in the room. (Tr., p. 112, Ls. 7-19, p. 116, L. 20 – p. 117, L. 1, p. 123, L. 16 – p. 124, L. 3.) As the district court repeatedly stated, it was reasonable for the officers to rely upon Gallagher’s consent to search. (Id.) The district court erred by skipping past the

reasonable suspicion test and simply imposing an additional duty to investigate. Once the district court found that the officers had reasonable suspicion to believe that Gallagher owned, possessed or controlled the motel room and the pink backpack, it should have denied the motion to suppress.

On appeal, Westlake also ignores the reasonable suspicion test and instead argues that because there was a mere possibility that the pink backpack belonged to someone other than Gallagher that the police could not rely upon the apparent authority of Gallagher. (See Respondent's brief, pp. 6-8.) The officers are only required to have a reasonable suspicion that the item is owned, controlled, or possessed by the person who granted consent to search the room. There is no requirement that the officers eliminate all other potential owners before they can rely upon a consent to search.

Westlake disregards the district courts findings that the officers acted reasonably by stating:

The district court may have found that the officers subjectively believed they were not doing anything wrong and that their mistake was 'understandable,' but it ultimately determined that their actions were not objectively reasonable.

(Respondent's brief., p. 8.) Westlake's statement is incorrect. The district court never held that the officers' actions were "not objectively reasonable." (Tr., p. 109, L. 2 – p. 125, L. 17.) The district court specifically held that the officers acted reasonably. (Tr., p. 112, Ls. 7-19, p. 116, L. 11 – p. 117, L. 1, p. 123, L. 16 – p. 124, L. 3.) However, the district court held that they had a duty of "reasonable inquiry" that they did not fulfill. (Tr., p. 122, L. 21 – p. 124, L. 3.) This, as cited above, is a misapplication of the law.

Westlake also argues that this court should ignore Westlake's failure to object to the consent to search of the motel room. "[T]here are no facts to support the assumption that Ms. Westlake heard the conversation or was permitted to object to the search." (Respondent's brief, p. 9.) It is undisputed that Gallagher gave verbal consent when she was standing "right next to the door, leading outside" and Westlake was on the bench two to three feet from the door, and the door was open. (Tr., p. 16, Ls. 12-15, p. 18, L. 17 – p. 18, L. 8, p. 25, L. 25 – p. 26, L.4, p. 60 – p. 61, L. 2.) Westlake does not point to any evidence to challenge the reasonable conclusion that Westlake heard the conversation occurring two to three feet away from her. It would be difficult for her not to hear a conversation that close. Thus, this court should consider Westlake's failure to object as a factor when determining whether the police had reasonable suspicion that the pink backpack belonged to Gallagher. (See Appellants brief, pp. 16-18 (citing See State v. Benson, 133 Idaho 152, 159, 983 P.2d 225, 232 (Ct. App. 1999); State v. Frizzel, 132 Idaho 522, 975 P.2d 1187 (Ct. App. 1999).)

Westlake raises three arguments that the pink backpack could have belonged to someone else. (Respondent's brief, pp. 6-7.) None of these arguments eliminate the officers' reasonable suspicion. Westlake first argues that because there were two females in the room "the backpack here obviously belonged to *either* Ms. Gallagher or Ms. Westlake." (Respondent's brief, p. 8). This argument supports the state's position because Westlake concedes that it was reasonable for the officers to believe that the backpack belonged to

Gallagher and thus the reasonable suspicion test is met. Moreover, Westlake's mere presence in Gallagher's motel room does not make it equally likely that containers in the room were hers.

Second, Westlake argues that the officers could not have reasonably believed the backpack belonged to Gallagher because the officers saw Gallagher enter the hotel room without the backpack. (Respondent's brief, p. 6.) This does eliminate reasonable suspicion. The officers watched the motel room for about 30 minutes. (Tr., p. 24, L. 1 – p. 25, L. 10.) They only saw Gallagher enter. (Id.) They did not see Westlake or anyone else come into the motel. (Id.) However, it is undisputed that Gallagher rented the motel room and it would be reasonable for the officers to believe that Gallagher would leave her stuff in the motel room and not carry it with her every time she left her room. It is more important that the officers did not see Westlake carry the backpack into the motel room.

Westlake's third argument, that the officers should have suspected the backpack was hers because Gallagher was standing and Westlake was sitting on the bed, is without support in the record. (See Respondent's brief, pp. 6-7.¹) There was no evidence that Westlake was the one sitting on the bed. Detective Williamson testified that when Gallagher first opened the door he saw Westlake and Scott Parker, the other individual present, "standing or sitting near the bed area." He did not specify whether Westlake was sitting or standing. (Tr., p. 10,

¹ Westlake's citation in support of her claim that she was sitting on the bed is not supported by the transcript. (Respondent's brief, p. 6 (citing Tr., p. 118, Ls. 8-23.)

L. 15 – p. 11, L. 10.) The reason Gallagher was standing was because she opened the door. (Id.) Plus, the motel room was small, approximately 10 feet by 15 feet. (Tr., p. 54, Ls. 1-5.) So Gallagher was also close to the pink backpack, and it was reasonable for the officers to suspect that Gallagher owned, possessed or controlled the pink backpack.

Westlake's attempts to distinguish Barker also fail. In Barker there was conflicting evidence regarding who owned or controlled the fanny pack. Barker told the police that Tate did not live at her apartment. Barker, 136 Idaho at 730, 40 P.3d at 88. In addition to male clothes, the master bedroom contained female clothes. Id. The fannypack was found in the master bedroom. Id. The police asked Barker who owned the fannypack and Barker said it was hers. Id. Despite conflicting evidence who owned the fanny pack the Idaho Supreme Court held that under the totality of the circumstances the officers had reasonable suspicion to believe that Tate had authority to consent to search the fanny pack. Id. at 732, 400 P.3d at 90.

Westlake argues, in her attempt to distinguish Barker, that:

The State presented no evidence to support the idea that Ms. Gallagher and Ms. Westlake had a joint interest in anything that was in the motel room. Unlike in Barker, where the police concluded that the fanny pack could have belonged to both Ms. Barker and Mr. Tate, since they lived tighter, the backpack here obviously belonged to *either* Ms. Gallagher or Ms. Westlake.

(Respondent's brief, p. 8.) This argument supports the states position. The only evidence was that it was Gallagher's room. When Gallagher gave consent to search, there was no evidence that anyone else had any interest in the room or

any item in it. It was more likely that containers in her room belonged to Gallagher and therefore reasonable for the officers to search the pink backpack.

The Seventh Circuit when faced with similar facts determined that the police could rely upon the consent of the renter of the hotel room to search a purse found in the room. U.S. v. Melgar, 227 F.3d 1038, 1039 (7th Cir. 2000). Police were investigating counterfeit checks. Id. Following up a lead, the police went to a local Holiday Inn to investigate a room rented by Rita Velasquez. Id. When they knocked on the door they found four people in the hotel room. Id. The police got consent to search each of the four people's wallets and purses. Id. Three more women then arrived at the room, Rita Velasquez, Marcella Hernandez, and the defendant Ziola Melgar. Id. The police searched Velasquez's purse and Hernandez's purse. Id.

A police officer then asked Velasquez, who had rented the room, for consent to search the hotel room. Id. The request was a general request and he did not ask her if the police could search particular closed containers, nor did he ask her which of the numerous people were actually staying in the hotel room. Id. Velasquez gave consent. Id. The officers then searched the room and found a floral purse that had no personalized markings on the outside. Id. at 1040. Inside they found evidence incriminating Melgar. Id. Melgar was charged. Id.

On appeal, Melgar argued that the contents of the purse should have been suppressed because the police never obtained permission from anyone to search that purse and the police should have understood that the purse did not

necessarily belong to Velasquez because there were several women in the room. Id. Melgar conceded that Velasquez had the apparent authority to search the room itself, but argued that this authority did not extend to the closed containers within the room. Id. Melgar argued that because the police had already matched up the other purses they had seen with the other women, they should have assumed that the purse found in the room was Melgar's. Id.

The Seventh Circuit rejected Melgar's arguments. Id. at 1041-1042. The Seventh Circuit was unable to find any authority that a consent search is permissible only if the police have positive knowledge that the closed container is under the authority of the person who originally consented to the search. Id. at 1041.

In a sense, the real question for closed container searches is which way the risk of uncertainty should run. Is such a search permissible only if the police have positive knowledge that the closed container is also under the authority of the person who originally consented to the search (Melgar's view), or is it permissible if the police do *not* have reliable information that the container is *not* under the authorizer's control. We are not aware of any case that has taken the strict view represented by the first of these possibilities.

Id. The Seventh Circuit held that because Velasquez, the renter of the hotel room, consented to the search and there was nothing about the floral purse which would have alerted the police that it was not Velasquez's pursue, that the police could search the floral purse. Id. at 1041-1042.

Here, the police had no reason to know that the floral purse they found under the mattress did not belong to Velasquez. They knew that the room had been rented to Velasquez; they knew that at least one of the women, Hernandez, had two purses; and there were no exterior markings on the purse that should have alerted them to the fact that it belonged to another person. Coupling those facts with the fact that Velasquez knew that they were searching for

evidence of counterfeit dividend checks, which could easily fit inside the purse, we conclude that the scope of Velasquez's consent encompassed their right to look into this container.

Id. The Seventh Circuit noted that if they ruled otherwise it would impose an impossible burden on police, because it would mean that the police could never search closed containers within a dwelling without asking the person whose consent is being given about every item they encounter. Id. at 1042.

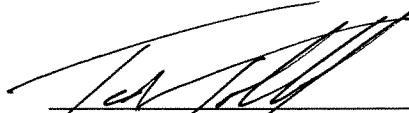
A contrary rule would impose an impossible burden on the police. It would mean that they could *never* search closed containers within a dwelling (including hotel rooms) without asking the person whose consent is being given *ex ante* about every item they might encounter.

Id. The Second Circuit is in accord, and holds that the authority to consent to search premises extends to any items found, with the exception of those items that “obviously” belong to another person. United States v. Snype, 441 F.3d 119, 136 (2nd Cir. 2006). Here there was no evidence that the pink purse “obviously” belonged to someone else other than Gallagher. The mere possibility that the pink backpack could have belonged to a third party is not enough to eliminate the reasonable suspicion that police had that it belonged to Gallagher. The district court erred when it failed to properly apply the reasonable suspicion test.

CONCLUSION

The state respectfully requests this Court reverse the district court's decision to suppress and this case be remanded for further proceedings.

DATED this 3rd day of February 2015.



TED S. TOLLEFSON
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 3rd day of February 2015, served a true and correct copy of the attached REPLY BRIEF OF APPELLANT by causing a copy addressed to:

KIMBERLY E. SMITH
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in The State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.



TED S. TOLLEFSON
Deputy Attorney General

